2007

Open or Closed: Balancing Border Policy with Human Rights

Elizabeth M. Bruch
Valparaiso University

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Human Rights Law Commons, Immigration Law Commons, and the International Law Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj96/iss2/3
Open or Closed:
Balancing Border Policy with Human Rights

Elizabeth M. Bruch

“We are living in a time when civil rights, meaning basic human rights, are being reformulated, redefined, and extended to new categories of people.”
Roger Nett (1971)

“We should not be afraid of open borders.”
Bill Ong Hing (2006)

INTRODUCTION

Open borders have not been a popular idea in the United States for at least a century. Since the federal government became involved in immigration regulation in the late 1800s, the history of immigration policy has generally been one of increasing restrictions and limitations.

1 Associate Professor of Law, Valparaiso University School of Law; Visiting Scholar, Centre for Feminist Legal Studies, Law Faculty, University of British Columbia. I am grateful to the Potomac Valley Writers Workshop for valuable review and critique of a draft of this article at the winter meeting, and especially to Johanna Bond and Margaret Johnson, and my colleague Jeremy Telman. I am also indebted to Dave Gage for his support and encouragement, to Marc Sanchez for research assistance, and to the students in my immigration law courses at Valparaiso University School of Law and Notre Dame Law School for their many thoughtful questions and comments over the past several years on issues related to borders, immigration and citizenship.

2 Roger Nett, The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth, 81 ETHICS 212 (1971).


4 However, they were essential to the early development of the nation. 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 2.02[1] (2004). The first general federal immigration law was adopted in 1882. Id. § 2.02[2] (imposing a head tax and excluding “idiots, lunatics, convicts, and persons likely to become a public charge”).

5 GORDON, MAILMAN & YALE-LOEHR, supra note 4, at §§ 2.02–2.04 (tracing the history of immigration legislation in the U.S.). The most noted exception to this trend is the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990). However, the two major immigration laws of 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), returned to the
As is true for many issues in immigration law, the debate on borders has shifted even more dramatically in the years since the attacks of September 11, 2001. The national agenda on immigration has been focused on increased enforcement, tightening or strengthening the borders, and, in some cases, restricting immigration. In fact, the only immigration-related accomplishment of the last Congress was a bill authorizing a 700-mile fence along the U.S.–Mexico border. Although the project has not been adequately funded and many think it will never be built, the bill illustrates, at least, the level of political debate on the border in the United States. In light of the well-known historical failure and repudiation of fences and walls between nations, this suggests a new low point in the national policy discussion. The current Congress may not do much better. At this writing, Congress has essentially abandoned consideration of a proposed comprehensive immigration reform bill. A selection of immigration bills of smaller scope are being discussed, but the overall tenor of the immigration debate remains centered on restriction and enforcement.

Notwithstanding this trend in law and policy towards closing the borders, many Americans are more conflicted and nuanced in their views on

---


7 See Daniel Benjamin, Wall of Shame 1961–1989, TIME, Nov. 20, 1989 at 42, available at http://www.time.com/time/daily/special/berlin/wall.html (describing the deaths and separation of families caused by and the symbolic significance of the Berlin Wall); Nett, supra note 2, at 224 ("building walls is a peculiarly lonely job and an admission of the inadequacy of the system").

8 See S. 1348, 110th Cong. (2007) (A bill to provide for “comprehensive immigration reform and for other purposes”). At the time it was introduced to much fanfare, Senator Richard J. Durbin of Illinois said: “This bill is drawing opposition from business, labor, Democrats, Republicans, theists and nontheists, American League and National League baseball fans. What I’m trying to say to you is there’s more opposition to this bill than support. The force behind this compromise is the understanding that if we fail, the process ends probably for the next two years.” Robert Pear and Michael Luo, Senate Votes, 64–31, to Retain Temporary Worker Program in Immigration Measure, N.Y. TIMES, May 23, 2007, at 20. Despite claims that the draft legislation represented a “grand bargain” addressing a broad range of immigration concerns, it reflected a troubling emphasis on restriction and enforcement. Id. The proposed legislation included: additional enforcement provisions (border enforcement and interior enforcement, including increased workplace enforcement); a temporary worker program (with limits on time period and caps on total numbers); reallocation of permanent resident visas (fewer family-based and more employment-based for professional and other skilled workers); and a long-term path to citizenship for some undocumented persons currently in the United States (after payment of fines and penalties, a waiting period and other qualifications). S. 1348, 110th Cong. (2007). See also AILA InfoNet, Doc. No. 07051768 (posted May 17, 2007), Summary of Senate “Grand Bargain,” http://www.aila.org/content/default.aspx?bc=10196712|8846|22365.
immigration, recognizing the potential advantages as well as the potential disadvantages.9 I see this conflict reflected in my immigration law course each semester. I begin the course by taking an informal poll of students’ views. I ask them to place themselves on the spectrum of immigration policy, choosing from closed borders (no immigration), to more restrictions on immigration, to the current levels of (and policy toward) immigration, to fewer restrictions on immigration, or open borders (unfettered immigration). Students spread across that spectrum, but the most interesting answers are at either end. I have yet to have a student advocate for completely closed borders, but every year a few students vote for completely open borders. Why then does national policy give so little consideration to this perspective?

This article considers the role of borders in U.S. immigration law and the influence of international law in shaping that role. The international law doctrine of sovereignty, with the related concepts of territorial integrity and national autonomy, has served as a foundational concept for a U.S. immigration policy that favors restrictions on immigration—"closing" the borders. However, an evolved understanding of the role of sovereignty in international law, and in particular its relationship to human rights, also offers the possibility of a radical reevaluation of immigration policy that would remove many of the current limitations on immigration—"opening" the borders.10 This article contends that U.S. policy is out of balance when it

9 A recent New York Times/CBS Poll suggests that two-thirds of Americans favor both a guest-worker program and a path to citizenship for those "with [a] good employment history and no criminal record" currently present in the U.S. without authorization. Julia Preston and Marjorie Connelly, Immigration Bill Provisions Gain Wide Support in Poll, N.Y. TIMES, May 25, 2007, at 1. Interestingly, the article also notes that almost one-half of the poll respondents favor some controls on immigration, with the remaining respondents equally divided in favor of either completely open borders or completely closed borders. Id. ("These polarized positions may help explain the acrimony of the immigration debate across the nation") See also Most Americans Favor Guest-Worker Program: Poll, REUTERS, Nov. 22, 2006, available at http://www.reuters.com/article/domesticNews/idUSN2138798620061122 (reporting nationwide poll by Quinnipiac University, which found that most Americans believe that unauthorized immigrants should be allowed to work and eventually become citizens, yet a majority also believe Congress should do more to address unauthorized entry). Even in the border states, such as Texas, there is a range of views: "Our opinions were kind of left out.... Here we are in the midst of an economic mega-boom and we're building fences.... What ridiculous symbolism. Here we are tearing walls down around the world and we're putting up walls [in the U.S.]" See Lynn Brezosky, Border Texans See Holes in Fence Proposal, ALBUQUERQUE J., Oct. 26, 2006, available at http://www.abqjournal.com/news/state/apholes10-26-06.htm (quoting Laredo Mayor Raul Salinas).

10 Although the voices in support of open borders are relatively few, they are eloquent. Professor Kevin Johnson has written the most recent and comprehensive argument in support of open borders. Kevin R. Johnson, Open Borders?, 51 UCLA L. REV. 193 (2003) (discussing the moral, economic and policy arguments in support of open borders). A recent report of the Global Commission on International Migration also cogently summarizes important arguments in support of migration without borders. Antoine Pécoud and Paul de Guchteneire, Migration
over- emphasizes restrictions on immigration—"closed" borders—without considering countervailing policy goals and values that would encourage fewer restrictions—"open" borders. It aspires to reinvigorate and redirect the public conversation in this area by drawing upon international human rights law to encourage a more expansive consideration of the spectrum of options—from "closed" to "open"—for our borders.

Part I of this article discusses the historical justifications, grounded in international law, in support of closed borders in the U.S.; it also illustrates how current immigration law gives prominence to this restrictive approach. The article then examines in Part II arguments in support of open borders, grounded in a modern understanding of international law, including international human rights law. It suggests how such a revised approach might be reflected in U.S. immigration law. Finally, the article concludes that the present emphasis in the U.S. on closing the borders is inconsistent with the expansion of human rights and may ultimately be ineffective in countering the economic, cultural and security concerns that underlie a restrictionist approach to the borders.

I. CLOSED BORDERS: SOVEREIGNTY, SECURITY AND SELECTIVITY

Although it is rarely framed this way in discussions of U.S. immigration law, U.S. borders and U.S. sovereignty within those borders are a function of international law as much as—or more than—domestic law. The U.S. Supreme Court relied on the international law doctrine of sovereignty in one of the foundational cases of immigration law, Chae Chan Ping v. United States (the Chinese Exclusion Case) in 1889. In that case, the Court articulated an expansive view of national sovereignty, based on international law, to justify federal regulation of immigration matters: sovereignty empowers a nation both to select who it will include as citizen-member or guest and to exclude those it deems to be a threat or otherwise undesirable. The Court has reaffirmed that expansive view of sovereign power repeatedly in subsequent years. The Court's sovereignty-based approach laid the

without Borders: An Investigation into the Free Movement of People, 27 GLOBAL MIGRATION PERSP. I (April 2005) available at http://www.gcim.org/attachements/GMP%20No%2027.pdf. Roger Nett started this discussion over 35 years ago. See Nett, supra note 2, at 212. My interest in and thoughts on this issue have been greatly influenced by these writers.

11 See infra notes 14–77 and accompanying text.
12 See infra notes 78–160 and accompanying text.
13 See infra conclusion.
14 Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581 (1889).
15 Id. at 604–05 (affirming that "the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations" and listing a range of related "sovereign" powers).
16 See Zadvydas v. Davis, 533 U.S. 678, 717 (2001) (Kennedy, J., dissenting) (characterizing detention decision in the context of removal as a "sovereign power"); Miller v. Albright,
foundation for "plenary" federal power in the area of immigration, and that sovereignty–based approach has been used—and continues to be used—to justify any subsequent efforts to limit, restrict or eliminate immigration.  

A. International Law Support for Closed Borders

The sovereignty of nation–states forms a bedrock principle of public international law. Its theoretical ascendancy occurred in the 1800s, and it was particularly current during the era of the Chinese Exclusion Case. It is integrally related both to principles of autonomy and to the idea of territorial integrity. As a matter of international law, the essential aspects

523 U.S. 420, 428–29 (1998) (relying on Fiallo); Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citing earlier decisions and noting that "[o]ur recent decisions have not departed from this long–established rule"); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972) (citing the Chinese Exclusion Case and Fong Yue Ting v. United States and noting that "the Court's general reaffirmations of this principle have been legion"); Harisiades v. Shaughnessy, 342 U.S. 580, 587–88 (1952) ("That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state"); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare"); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("every sovereign nation has the power, as inherent in sovereignty, and essential to self–preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe").


18 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (5th ed. 1999) ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality."). See id. at 106 ("The normal complement of state rights, the typical case of legal competence, is described commonly as 'sovereignty' . . . ."). John Boli, Sovereignty from a World Polity Perspective, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 53 (Stephen D. Krasner, ed., Columbia Univ. Press 2001) ("it is hardly too much to say that it constitutes a core element in the very definition of the state").

19 BROWNLIE, supra note 18, at 126 (describing historical changes in concepts of law, including sovereignty); see Satvinder S. Juss, Free Movement and World Order, 16 INT'L J. REFUGEE L. 289, 297–302 (2004) (describing the evolving relationship between sovereignty and migration).

20 BROWNLIE, supra note 18, at 105–06 ("The state territory . . . together with the govern-
of national sovereignty include equality and equal relations between states and the autonomy to consent (or not) to relationships and obligations among states. Fundamentally, the idea of national sovereignty is the power to exercise authority over the individuals living within the territory of the state and to act on behalf of those citizen-members of the state. However, in addition to these powers to act affirmatively toward and on behalf of its own population, sovereignty also empowers a state to exclude other states—and by extension, the populations of other states—to prevent them from intruding upon or interfering with the territorial integrity of the state.

Despite the historical links between national sovereignty and the powers to include and exclude, the United States government did not initially assert much control in the area of immigration. For the first century of its existence, the United States allowed immigration matters to be addressed primarily by the individual states. However, in 1889, that shifted abruptly with the Supreme Court's decision in the Chinese Exclusion Case. In that case, the Court determined that the power to regulate immigration was vested in the federal government. The Court did not reach that conclusion by relying on any express constitutional power or provision.

---

21 Brownlie, supra note 18, at 289 ("sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law"). Cassese, supra note 20, at 88–91 (describing the distinct but related notions of sovereignty and legal equality). These principles are also reflected in the U.N. Charter, article 2,1, which states: "The Organization is based on the principle of the sovereign equality of all its Members." U.N. Charter art. 2, para. 1.

22 Cassese, supra note 20, at 89. See Brownlie, supra note 18, at 289–90. In particular, nation–states have historically been considered "exclusively in control of nationality matters." Id. at 385–86.

23 Cassese, supra note 20, at 89. Other characteristics of sovereignty include various immunities for state actions and state officials, as well as respect for state nationals, officials and property abroad. Id. at 90.


25 Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 603 (1889).

26 Id. ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy").

27 The Court alludes to general powers conferred on the federal government under the Constitution, such as the war power and other foreign relations powers, but does not cite any specific Constitutional provisions. Rather, the Court characterizes these as "sovereign" powers. Id. at 604.
Rather, the Court reached that conclusion by reasoning that the power to exclude noncitizens is embedded within the power of a nation to control its own territory—a power that is inherent to all sovereign states. The Court simply asserted that the nature of sovereignty, an undisputed attribute of nation-states, required the power to exclude:

[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

However, the Court buttressed that conclusion by enumerating other inherent and express powers of the federal government, such as the war powers, and linking the power to exclude to concerns of national security and cultural threat (though framed in the language of race—and racism) that seem familiar today:

To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us ... If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

The Court reasoned that without the absolute power to exclude, the state would be subject to the control of another state—the state whose nationals it could not exclude.
Although the Chinese Exclusion Case was the first decision to ground the power to exclude in the inherent powers of sovereignty recognized as a matter of international law, this reasoning was reiterated by the Court in subsequent cases. In Ekiu v. United States, the Court stated:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.\(^3\)

Also, in Fong Yue Ting v. United States, the Court quoted at some length the international law scholars Vattel\(^3\) and Ortolan\(^4\) to support the "inherent and inalienable right" of a sovereign nation to exclude or expel noncitizens.\(^3\)

The domestic consequences of sovereignty in terms of the government's ability to exclude noncitizens have not been seriously reevaluated in the

3. Ekiu v. United States, 142 U.S. 651, 659 (1892) (deciding that noncitizens do not have due process rights in exclusion proceedings).

33 The Court quoted Vattel as stating:

`Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner. 'Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates.' [sic]

Fong Yue Ting v. United States, 149 U.S. 698, 707-708 (citing Vatt. Law Nat. lib. 1, c. 19, §§ 230, 231).

34 The Court quoted Ortolan as follows:

The government of each state has always the right to compel foreigners who are found within its territory to go away, by having them taken to the frontier. This right is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is matter of pure permission, of simple tolerance, and creates no obligation. The exercise of this right may be subjected, doubtless, to certain forms by the domestic laws of each country; but the right exists none the less, universally recognized and put in force. In France no special form is now prescribed in this matter; the exercise of this right of expulsion is wholly left to the executive power.' [sic]

Fong Yue Ting, 149 U.S. at 708 (citing Ortolan, Diplomatie de la Mer, (4th Ed.) lib. 2, c. 14, p. 297) (original in French)).

35 Id. (quoting other international law scholars as well). See cases cited supra note 16 as more recent examples of the Court's reliance on international law and the inherent powers of sovereignty to justify immigration restrictions.
United States since these early decisions even though the international meaning and understanding of sovereignty has evolved significantly since the 1880s and with greater rapidity within the last decades. The Supreme Court continues to defer to the political branches' "plenary power" in the area of immigration, particularly the inherent and absolute power to exclude as a function of sovereignty. As in the Chinese Exclusion Case and other early cases, the rationale for such a sweeping view of sovereignty is often, expressly or implicitly, related to concerns about national security or the cultural or economic impact of immigration.

**B. Closing the Borders in Current U.S. Immigration Law**

Current U.S. immigration law and policy also continue to reflect this sweeping view of sovereignty and the absolute power to exclude. The resulting "closure" of the borders is evident in various strands of the national approach to immigration: from limits on lawful immigration and naturalization, to increased border enforcement efforts, to physical obstacles, to the current popularity of border vigilantism. Unsurprisingly, the arguments in favor of closed borders have been closely linked to national sovereignty, and they have spanned a familiar range of concerns about threats to national security, detrimental economic impact or cultural change, and general apprehension about opening the "floodgates."

---

36 See cases cited supra note 16.

37 See, e.g., Zadvydas v. Davis, 533 U.S. 678, 717 (2001) (Kennedy, J., dissenting); Miller v. Albright, 523 U.S. 420 (1998) (Scalia, J., concurring) (citing earlier decisions for the description of "the power to expel or exclude aliens as a fundamental sovereign attribute").


39 Enforcement of the national borders is primarily entrusted to the Customs and Border Patrol, a subdivision of the Department of Homeland Security. 1 Immigration Law Service 2d § 1:132. The Border Patrol is responsible for patrolling over 7,000 miles of land border and over 2,000 miles of coastal waters. Id. Other subdivisions within the Department of Homeland Security and other agencies are also involved in some aspects of border enforcement. Id. § 1:128.

40 Physical obstacles include fencing, border patrols, and a range of technologies. See infra notes 59–60 and accompanying text.

41 The Minuteman Project is perhaps the most well-known, but there are others as well. See The Minuteman Project, http://www.minutemanproject.com/. Other groups include Ranch Rescue USA and American Border Patrol. See also, Charlie LeDuff, Illegal Immigrants File Suit Against Vigilante Patrols, N.Y. TIMES, May 30, 2003, at A20; infra note 61 and accompanying text.

42 Perhaps unsurprisingly, the arguments made today are similar to those anticipated by Roger Nett in 1971 in his consideration of a right to free movement. Nett, supra note 2, at 223 ("Where migration is not allowed, it is usually in the name of national security or else based on the claim that there is no place for the immigrants or no prospect for their gainful employment").
Even a relatively cursory examination of current U.S. immigration law reflects this perspective. As an initial matter, immigration to this country is not unlimited, either in terms of raw numbers or in terms of the types of immigration available. There is an annual cap of approximately 675,000 persons who may immigrate to the United States, and within that cap there are further limits by country. In addition, prospective immigrants must fit into one of the available categories of immigration; it is not enough simply to want to immigrate to the United States. Congress has established affirmative categories of persons who may immigrate and has set preferences within those categories. In general terms, the categories comprise immediate relatives, family-sponsored, employment-based, diversity or refugee immigration. The categories represent policy judgments about who is desirable (or, at least, acceptable) as an immigrant. Without a family connection, particular employment skills, a claim of persecution, or the good luck to prevail in the diversity lottery, an aspiring immigrant is without options.

Immigration into the U.S. is a two-step process: potential immigrants must affirmatively fit into one of the eligible categories, but they must also avoid being eliminated based on one of the many grounds of inadmissibility.

43 The first federal law limiting immigration was passed in 1875 barring “convicts and prostitutes.” GORDON, MAILMAN & YALE-LOEHR, supra note 4, at § 2.02. Since that time, both quantitative limits—numerical limits—and qualitative limits—limits on the types of individuals who may immigrate—have been added to the immigration laws. The general pattern has been to expand, rather than contract, those limitations. See supra note 4.

44 INA, 8 U.S.C. § 1151(c)-(e) (2000) (setting forth the annual limits for family-sponsored, employment-based and diversity immigrants); see also 8 U.S.C. § 1152 (2000) (discussing per country numerical limitations). The provisions set for the calculations, including ceilings and in some cases floors; the actual numbers vary from year to year. For example, the annual Yearbook of Immigration Statistics lists the following numbers of persons obtaining Lawful Permanent Residence in recent years: 1,122,373 in FY 2005; 957,883 in FY 2004; 703,542 in FY 2003; 1,059,356 in FY 2002; and 1,058,902 in FY 2001. See OFFICE OF IMMIGRATION STATISTICS, 2005 YEARBOOK OF IMMIGRATION STATISTICS, Table 1, available at, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf [hereinafter 2005 YEARBOOK OF IMMIGRATION STATISTICS]. Moreover, these provisions relate only to permanent immigration, as opposed to nonimmigrant entries, such as students and visitors, which are temporary in nature and involve much higher numbers.


46 8 U.S.C. § 1151. If a prospective immigrant does not fit within one of the eligible categories, he or she is ineligible to enter the United States as an immigrant, regardless of other merit or interest. Those who seek to enter the United States are presumed to be immigrants—rather than non-immigrants—unless they can prove otherwise. See 8 U.S.C. § 1101(a)(15) (2000) (defining an “immigrant” as any noncitizen who does not fit within one of the specified categories of “nonimmigrant aliens”); 8 U.S.C. § 1184(b) (2000) (noncitizen is presumed to be an immigrant unless he or she can establish otherwise).

The Immigration and Nationality Act includes ten general categories of inadmissibility, including a catch-all miscellaneous category, each with numerous sub-parts. Much like the affirmative categories, these negative prohibitions also reflect judgments as to who should be allowed into the country as an immigrant. For example, a person “likely to become a public charge” is inadmissible, as are persons with certain mental and physical disorders. In spite of desirable characteristics such as a family connection or a valuable employment skill, a potential immigrant who falls within one of the inadmissibility grounds will not be permitted to immigrate.

In addition to these hurdles, there are further constraints on immigrants while they are present in the United States, most notably the ongoing risk of removal and the limits on the ability of immigrants to naturalize to citizenship. The affirmative and negative limits on immigration, together with the complexity of the laws and procedures involved, serve to close the borders and restrict the flow of immigration. The rationales for many of these limits reflect selectivity in the decision to include—policy choices

48 The grounds of inadmissibility are set forth in the INA, 8 U.S.C. § 1182(a) (2000) and its various sub-sections.


50 See 8 U.S.C. § 1182(a)(4) (excluding any noncitizen “likely at any time to become a public charge”); Id. § 1182(a)(1) (excluding noncitizens with particular diseases or with physical or mental disorders that may threaten the property, safety or welfare of themselves or others).

51 8 U.S.C. § 1227(a) (2000) (setting forth the categories of deportable noncitizens). The grounds for removal parallel in many respects the grounds of exclusion and encompass conduct both within and outside the United States. They include grounds related to violations of the immigration laws, criminal offenses, documentary fraud, national security, likelihood of becoming a public charge, and unlawful voting. Id. For many grounds, there is no limitations period, and an immigrant can be deported at any time—even decades later—after the relevant violation or offense. See, e.g., Id. §1227(a)(2)(A)(iii) (a noncitizen “convicted of an aggravated felony at any time after admission is deportable”).

52 See INA, 8 U.S.C. §§ 1422-27 (2000) (stating requirements for naturalization and grounds for prohibiting naturalization). The requirements include both affirmative requirements, such as having an understanding of the English language and knowledge of history and civics, and negative requirements, such as the prohibition on membership in the Communist Party or any other totalitarian party. 8 U.S.C. §§ 1423-24.

53 See, e.g., 8 U.S.C. §§ 1154, 1186(a) (for a statutory overview of the complex procedures for obtaining immigrant status based on marriage and family relationships).
about desirable and undesirable immigrants—and also concerns about national security—and other explicit and implicit threats—in the decision to exclude.

Similarly, and more obviously, increased border enforcement efforts reflect a desire to close the borders to immigration, particularly to unauthorized or irregular immigration. Potential immigrants who do not fit within one of the designated categories are turned away. Immigrants who are present in the United States without authorization are subject to "removal" or even "expedited removal." Immigrants who have violated immigration law in the past are subject to additional bars on admission or reentry in the future, sometimes indefinitely. In addition, tremendous financial and personnel resources are devoted to staffing the borders and enforcing the immigration laws, explicit efforts to restrict the flow of immigration and tighten the borders.

54 Although "illegal aliens" and "illegal immigration" are common terms in public discourse, they have developed needlessly pejorative connotations. This article will instead use the alternative terms of "unauthorized immigration" or "irregular immigration."


56 See INA, 8 U.S.C. § 1229(a) (2000) (describing removal process); 8 U.S.C. §§ 1225, 1228 (describing expedited removal). In 2005, there were "208,521 noncitizens formally removed from the United States[;]" of those, 35 percent, or 72,911, were removed through the expedited removal process. DOUGHERTY ET AL., supra note 55, at 1.

57 Section 212(a) of the Immigration and Nationality Act sets forth numerous bars on re-entry for those who have violated the immigration laws. For example, failure to appear for removal hearing without reasonable cause renders a noncitizen inadmissible for 5 years. 8 U.S.C. § 1182(a)(6)(B) (2000). If a noncitizen is ordered removed, he or she becomes inadmissible for either 5 or 10 years from date of removal, depending on when proceedings are initiated. The bar on reentry goes up to 20 years after a second or subsequent removal, and it is permanent in case of removal based on an "aggravated felony." Id. § 1182(a)(9)(A). There are also bars on reentry after periods of "unlawful presence" in the U.S. See id. § 1182(a)(9)(B).

58 The U.S. Customs and Border Protection states that on a "typical day" in 2006, it employed 42,000 employees (including 18,000 officers and 12,300 Border Patrol agents); processed 1.1 million persons (including 680,000 noncitizens); executed over 3,000 arrests and apprehensions; and refused entry to over 600 persons. U.S. CUSTOMS AND BORDER PROTECTION, "ON A TYPICAL DAY" FACT SHEET at 1 (2007), available at http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/cbp_overview/typical_day.ctt/typical_day.pdf (listing various statistics). The President's proposed budget for Customs and Border Protection for FY 2007 is approximately $8 billion. See U.S. CUSTOMS AND BORDER PROTECTION, CBP BUDGET IN BRIEF (2007), available at http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/(posted Aug. 6, 2007); see also 2005 YEARBOOK OF IMMIGRATION STATISTICS, supra note 44, at 91-124, Tables 34-42 (describing enforcement actions).

Finally, in recent years, the effort to close the borders has expanded to include both physical obstacles and popular participation in "enforcement" efforts. Approximately 14 miles of the U.S.-Mexico border are now fenced, and recent legislation has called for an additional 700 miles of fencing. In addition to the actual physical fencing, there are more border patrol officers and a wide range of monitoring technology, such as automatic drones and motion detectors.

Despite the many increased efforts to patrol the borders, there remains such a level of frustration by some members of the public at the limits of enforcement that grassroots organizations, most notably the Minutemen, have sprung up to "assist" with government efforts to enforce the borders.

The arguments in favor of closed borders and in support of measures to effectuate them have been closely linked to the original notion of sovereignty reflected in the Chinese Exclusion Case. Moreover, these arguments feature a similar range of concerns—from national security worries to anxiety about the economic and cultural impact of immigrants and an overarching fear that the nation will be overwhelmed if the immigration "floodgates" are opened.

The concern about national security is most obviously linked full control of our borders is a priority for the Department of Homeland Security. . . . It is not practical to believe that we can seal our border entirely, but we can create such a high likelihood of interdiction that it will create an unequivocal deterrent effect on those who wish to cross illegally.


63 See Johnson, supra note 10, at 201–03 (discussing and refuting these common concerns about open borders); Pécoud & Guchteneire, supra note 10 (noting little empirical support for
to the original idea of sovereignty and the nation's ability to protect and preserve itself against external threats.

National security has been a focus of U.S. immigration law since the Alien Act of 1798. It is directly reflected in the law in various grounds of inadmissibility and removability. The inadmissibility grounds exclude, in broad language, noncitizens who: seek to engage or engage in espionage, sabotage or "any other unlawful activity"; participate in, incite or otherwise support terrorist activity or organizations; may cause "potentially serious adverse foreign policy consequences;" have been or are members of the Communist Party or any other totalitarian party; or participated in Nazi persecution, genocide, torture or extrajudicial killing.

The grounds for removability, though somewhat narrower, are similar in many respects and identical in others. Moreover, the immigration reform efforts of the last decade—including both the 1996 changes in the law and the changes since September 11, 2001—have often been motivated, at least in part, by national security concerns and supported by such rhetoric.

Nonetheless, national security is not the only—or even necessarily the primary—rationale for closed borders. Economic and cultural concerns are

67 8 U.S.C. § 1227(a)(4) (listing security related grounds of deportability, including seeking to engage or engaging in espionage, sabotage or "any other criminal activity which endangers public safety or national security;" participating in, inciting or otherwise supporting terrorist activity or organizations or receiving military-type training from a terrorist organization; other activities that may cause potentially serious adverse foreign policy consequences; or participation in Nazi persecution, genocide, torture or extra-judicial killing or severe violations of religious freedom).
68 For example, both AEDPA and IIRIRA were enacted in the wake of, and motivated in part by, the 1994 Oklahoma City bombing and the original World Trade Center bombing in 1993. See, e.g., AEDPA, Pub. L. No. 104–132, 110 Stat. 1214 (1996) (enacted to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes"). More recently, that has been particularly true of both the PATRIOT Act and REAL ID. See Uniting and Strengthening America by Providing Appropriate Tools Required to Interdict and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001); REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231 (2005); Statement of the Honorable Michael Chertoff, Secretary, U.S. Department of Homeland Security Before the United States Judiciary Committee, (Feb. 28, 2007), available at http://www.dhs.gov/xnews/testimony/testimony_1172853501273.shtm ("First, and most important, immigration reform should ensure that we maintain effective safeguards preventing terrorists from taking advantage of our tradition of welcoming immigrants of all nations").
69 In fact, even some proponents of enforcement–based immigration reform have asserted that national security may be better served by more open immigration and cross-border collaboration. See Remarks by Homeland Security Secretary Michael Chertoff on Secure Borders and Open Doors in the Information Age, (Jan. 17, 2006), available at http://www.dhs.
also paramount. Regular debate appears in the popular press and in academic scholarship about the economic and cultural impact of immigration. Fears about the economic burden caused by immigrants or the economic impact of immigration on citizens run through current immigration law: there are economic-based grounds of inadmissibility and removability; immigrants are prohibited from receiving most forms of public benefits and assistance; and immigrant labor is permitted generally only when it will not have an adverse impact on U.S. workers. Until fairly recently, cultural concerns were also manifest in the immigration laws. Cultural concerns were often mediated through the language of race—as in the Asian exclusion laws or other limits that persisted until the 1950s. Although less explicit in the law today, apprehensions about cultural impact remain evident in the numerical caps on immigration, including the per country limits that


serve to restrict immigration from the high demand countries of Central America,75 and the structures of the "diversity" lottery.76

Grounded in the idea of sovereignty and the sovereign power to exclude, this constellation of fears and concerns about immigration has gradually dominated U.S. immigration law and policy. The focus has become increasingly about putting limitations on immigration, and the goal has become tightening or even closing the U.S. borders. However, this is not necessarily an inevitable or even a wise policy, as is becoming increasingly clear. Growing frustration with this failed policy of closure has led to renewed calls for a more balanced approach to crafting immigration policy.77 Fortunately, and interestingly, the same underpinning of sovereignty under international law that has justified and reinforced the closed border approach also presents the possibility of a radically different approach that emphasizes loosening restrictions or opening the borders.

II. Open Borders: Rights, Rationality and Resources

Sovereignty in international law is, of course, fundamentally connected to both territorial integrity and principles of national autonomy.78 However, the international meaning and understanding of these ideas has evolved since the 1880s and the era of the Chinese Exclusion Case. With the rise of the modern human rights movement79—and the challenges, and often

---

75 Section 202 of the INA sets per-country limits of 7%, with some exceptions for the total annual family-sponsored and employment-based immigration preference limits. 8 U.S.C. § 1152(a)(2). This results in a significant backlog in processing cases from high-demand countries, such as Mexico. The current U.S. State Department Visa Bulletin lists the wait times for family-sponsored visas for Mexico ranging from approximately 6 to 19 years, depending on category, and for employment-based visas ranging from current (immediately available) to 6 years, again depending on category. U.S. DEPT. ST. BULL. No. 104, Vol. VIII (Apr. 2007), available at http://travel.state.gov/visa/frvi/bulletin/bulletin__3169.html.


78 See supra notes 18-37 and accompanying text (describing contours of sovereignty in international law).

violence, of the end of colonialism and the break-up of the Soviet Union and former Yugoslavia—the dominance of sovereignty and territorial integrity has eroded to accommodate the rights of both individuals and “peoples” within and outside of states. These rights include individual and group rights to self-determination, freedom of movement, and freedom from discrimination. An evolved understanding of sovereignty and its relationship to individual human rights should inform, and transform, the domestic view of immigration law in the United States. More open borders would reflect a rational policy balance between protecting individual rights and respecting sovereign powers to control territory and national membership.


81 Cassese, supra note 20, at 104 (describing human rights as “competing—if not at loggerheads—with the traditional principles of respect for the sovereign equality of States and of non-interference in the domestic affairs of other States”); see Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 3-4 (1999); see also Thomas Kleven, Why International Law Favors Emigration Over Immigration, 33 U. MIAMI INTER-AM. L. REV. 69, 71-72 (2002); Juss, supra note 19, at 321-22 (“sovereignty has never been weaker”).


84 Principles of equality and non-discrimination are threaded throughout the major international human rights documents. See, e.g., ICCPR, supra note 82, art. 2; ICESCR, supra note 82, art. 2; Universal Declaration, supra note 83, art. 1-2.

Other human rights, such as the right to political participation and the right to work, are also relevant to the relationship between sovereignty and national borders. See Pécout & Guicheneire, supra note 10, at 15-16. These rights are also reflected in the major international human rights instruments discussed infra.
A. International Law Support for Open Borders

Sovereignty continues to be a bedrock principle of international law; yet the state-centric focus of sovereignty has now been balanced at the international level by increased consideration of the individual. The development of international human rights law has been most fundamental in shifting the balance in this direction. States are still the primary actors on the international level—both in developing and in implementing international law, including international human rights law. Furthermore, states are still given tremendous latitude in how they arrange their domestic affairs and in how they treat both their citizens and those subject to their jurisdiction and control. However, sovereignty is not without limits, particularly when there is a countervailing individual or group rights interest. Under international

85 Cassese, supra note 20, at 104.


87 There are international mechanisms to monitor States' compliance with international human rights obligations—both "treaty bodies" such as the Human Rights Committee (created to monitor compliance with the ICCPR) and non-treaty bodies such as the Human Rights Commission (a subsidiary body of the United Nations to monitor general compliance with international human rights obligations). However, these international mechanisms are generally considered to be avenues of last resort. See, e.g., ICCPR, supra note 82, art. 41(c) (requiring exhaustion of all available domestic remedies before the Committee will consider a matter); see also Joan Fitzpatrick, The Role of Domestic Courts in Enforcing International Human Rights Law, in Guide to International Human Rights Practice 247, 247-68 (Hurst Hannum ed., 3d ed. 1999) (describing the primacy of national mechanisms in protecting human rights). There is a presumption in favor of resolving problems at the national level—relying on national governments to set up their domestic systems to protect human rights, provide remedies for violations and generally implement international human rights obligations. The role of the international mechanisms is primarily to establish and develop normative standards.

88 International human rights tribunals generally give some deference to national governments in defining the content and scope of human rights protection domestically. This is often referred to as the "margin of appreciation" doctrine. See, e.g., George Letsas, Two Concepts of the Margin of Appreciation, 26 Oxford J. Legal Stud. 705 (2006) (discussing history and uses of the doctrine of margin of appreciation); Paul Mahoney, Marvelous Richness of Diversity or Invidious Cultural Relativism, 19 Hum. RTS. L. J. 1, 1-2 (1998) (discussing the principle of subsidiarity and the margin of appreciation).

The common language of undertaking in human rights treaties requires a state party to respect and ensure the rights of "all individuals within its territory and subject to its jurisdiction." See ICCPR, supra note 82, art. 2(1); ICESCR, supra note 82, art. 2(1).

89 Cassese, supra note 20, at 104-08 (discussing the limits imposed on sovereignty by principles of human rights and self-determination).
law, states that have undertaken human rights obligations, either by treaty\(^9\) or under customary international law,\(^9\) have a responsibility to respect and ensure those rights.\(^9\) International law operates primarily as a voluntary “consent regime,” however these obligations are binding on states once they are undertaken.\(^9\) Although the United States is party to few of the major international human rights treaties—namely, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—it has generally assumed a leadership role in seeking to advance protection of human rights at the international level.\(^9\) The United States’ leadership

90 The three major instruments of the “International Bill of Rights” are the Universal Declaration, the ICCPR, and the ICESCR. See Universal Declaration, supra note 83; ICCPR, supra note 82; and ICESCR, supra note 82. The Universal Declaration is not a binding treaty, but some scholars believe it has achieved the status of binding customary international law. See, e.g., Louis Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1, 16-17, 20 (1982). The Covenants are both binding treaties; and the United States is party to the ICCPR, among others.

91 Customary international law is also binding on states. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (identifying sources of international law, including customary international law). In the context of international human rights, there is a limited set of rights violations that constitute violations of customary international law. See id. § 702.

92 For example, the general language of obligation in the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, supra note 82, art. 2(1).


94 The United States and the other victorious allied nations played a foundational role in the development of both the substantive components of international human rights law and the international monitoring mechanisms. See JOHN P. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE, 31–33, 42–43 (1984); John P. Humphrey, The Universal Declaration of Human Rights: Its History, Impact and Juridical Character, in HUMAN
role has not, however, translated into increased protection of human rights in the context of domestic immigration law.

In the context of immigration and border control, many internationally-recognized human rights are implicated, including the rights to self-determination, freedom of movement, and freedom from discrimination. However, in light of the close linkage between sovereignty and border control, this connection to human rights is seldom raised or discussed in the context of national policy discourse.

The right to self-determination is both fundamental and deeply contested as a matter of international law. On the one hand, it has underpinned the idea of national independence and sovereignty since the days of the American and French Revolutions. Over time, self-

---


97 This article does not address or consider the many complex and interesting issues related to the incorporation of international law into the domestic legal system nor the many possible uses of international law in the domestic context. Instead, it limits itself to suggesting that meaningful consideration of the principles, policy goals, and theoretical developments reflected in international human rights law would advance the development of domestic immigration law.

98 Cassese, supra note 20, at 105 (tracing the history from the French Revolution); Daniel Philpott, Self-Determination in Practice, in National Self-Determination and Secession
determination—the idea of the consent of the governed in any sovereign state—has become the standard for judging the legitimacy of the exercise of sovereign power. The two major human rights treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—address the right of self-determination in expansive terms and in a place of primacy. In identical language, both Article 1 of the ICESCR and Article 1 of the ICCPR state, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Although the right of self-determination serves in part to justify sovereignty and the territorial integrity of states, it is also constrained by those ideas. Nonetheless, when the right of self-determination is exercised as the right of a “people,” rather than an existing nation, there is the potential to disrupt the sovereignty of an existing nation-state.


99 Cassese, supra note 20, at 105–07. Self-determination “requires a free and genuine expression of the will of the peoples concerned.” Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 32, 33 (Oct. 16). See also Hilary Charlesworth & Christine Chinkin, The Boundaries of International Law: A Feminist Analysis 151 (2000) (noting that “a sovereign state is in theory built on the self-determination of its population in the sense that the people should determine the way that government is organised”).

100 This linkage of the right to self-determination to the entire spectrum of rights reflected in the two Covenants underscores its importance in international law. Charlesworth & Chinkin, supra note 99, at 152.

101 ICCPR, supra note 82, art. 1(1); ICESCR, supra note 82, art. 1(1). The remainder of shared Article 1 reads:

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Id. The United Nations Charter also refers to respect for self-determination as one of its purposes. Article 1 of the Charter states that “[t]he Purposes of the United Nations are: . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measure to strengthen peace.” U.N. Charter art. 1, para. 2 (entered into force, Oct. 24, 1945).

102 Cassese, supra note 20, at 106–08; Philpott, supra note 98, at 86 (“[s]elf-determination has long lingered in the shadow of state sovereignty”).

103 Cassese, supra note 20, at 106–107. This was dramatically illustrated with the break-
Thus, the right of self-determination is usually least controversial when it is exercised as an individual right, within the confines of an existing nation-state. However, even when the right of self-determination is exercised as an individual right, it has the potential to have a significant impact on national sovereignty if the individual seeks to pursue his or her political, social and cultural development in a nation other than the one of his or her citizenship.

Typically, the exercise of individual human rights is not limited to the country of one’s citizenship; in fact, a state has the obligation to protect the human rights of those “subject to its jurisdiction,” not just its citizens. In this view, the recognition of the right to self-determination has not stopped, and arguably should not stop, at national borders.

The principles underlying the rights to freedom of movement and freedom from discrimination have similar transformative potential. The right to freedom of movement and important related rights are articulated in the major international human rights instruments. The Universal Declaration of Human Rights includes the right to “freedom of movement and residence within the borders of each State” and the right to “leave up of former Yugoslavia, for example. See, e.g., Bartram S. Brown, Human Rights, Sovereignty, and the Final Status of Kosovo, 80 CHI.-KENT L. REV. 235 (2005); Philpott, supra note 98, at 79.


See supra note 100 (noting that the common language of obligation in human rights treaties requires a State Party to respect and ensure the rights of “all individuals within its territory and subject to its jurisdiction”). See ICCPR, supra note 82, art. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”); cf. ICESCR, supra note 82, art. 2(1) (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”).

The Universal Declaration is a consensus declaration of the United Nations General Assembly; it is not a binding treaty. However, some scholars believe that it has attained the status of binding customary international law. See supra note 83.
any country, including [one's] own, and to return.”108 It also recognizes the right to a nationality109 and to seek asylum from persecution.110 “These rights are also recognized in more limited form in the ICCPR as the right to “liberty of movement” and to choose a residence when one is already lawfully within a territory.111 The cautious framing of these rights and the limitations upon them reflect the tension between respect for sovereignty and for individual rights—and the continuing dominance of sovereignty in the area of immigration.112 Although international human rights law has not explicitly recognized complete freedom of movement across national borders or a right to the citizenship of one's choosing, the law may be moving in that direction.113 When freedom of movement is considered together with the right to individual self-determination and freedom from discrimination, it arguably should. Full recognition of the right to free movement in this manner would similarly require a fundamental reconsideration of U.S. immigration law and its static notion of sovereignty and the power to exclude.

108 Universal Declaration, supra note 83, art. 13.

109 Id. at art. 15.

110 Id. at art. 14. Article 14 of the Universal Declaration also states “[t]his right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” Id. This right has been specifically recognized in the U.S. immigration law provisions regarding asylum. See, e.g., INA, 8 U.S.C. § 1157 (2007) (asylum procedure); 8 U.S.C. § 1158 (2000) (definition of refugee); 8 U.S.C. § 1101(a)(42) (2000).

111 Article 12 provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

ICCPR, supra note 82, art. 12. Article 13 addresses the rights of noncitizens in case of expulsion when lawfully present in a country other than the country of citizenship. Id. at art. 13.

112 They also reflect the views of sovereignty contemporaneous to their adoption—1948 for the Universal Declaration and the 1966 for the ICCPR. Universal Declaration, supra note 83; ICCPR, supra note 82.

113 There is an asymmetry in the current understanding of the right to freedom of movement: there is full recognition of a right to emigrate, or leave one's country, and only limited recognition of a right to immigration, to enter another country. See Juss, supra note 19, at 289; Kleven, supra note 81, at 69. But see Véoud & Guchtenoire, supra note 10.
In the context of nondiscrimination, the balance between sovereignty and individual rights shifts more dramatically in the direction of protection of human rights. The right to be free from discrimination is stated in expansive terms in the Universal Declaration of Human Rights, the ICCPR, and the ICESCR.\textsuperscript{1} The Universal Declaration of Human Rights proclaims in its first article that “[a]ll human beings are born free and equal in dignity and rights.”\textsuperscript{115} It expands upon that general principle by clarifying that discrimination on a broad array of grounds is not permitted. “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\textsuperscript{116} The major human rights Covenants include identical language.\textsuperscript{117} This principle of nondiscrimination is also incorporated in the major regional human rights treaties,\textsuperscript{118} and two particular forms of discrimination—racial discrimination and discrimination against women—are the subjects of separate international conventions.\textsuperscript{119} Although citizenship status is not


\textsuperscript{115} Universal Declaration, supra note 83, art. 1.

\textsuperscript{116} Id. at art. 2.

\textsuperscript{117} Article 2 of the ICESCR provides: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICESCR, supra note 82, art. 2. Article 2 of the ICCPR states, “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory . . . the rights recognized in the present Covenant, without distinction of any kind . . . ” ICCPR, supra note 82, art. 2. See supra note 85 (discussing similar provisions in the U.N. Charter).

\textsuperscript{118} African Charter on Human and Peoples’ Rights art. 2, June 27, 1981, 21 I.L.M. 58 (1982) (prohibiting distinction based on “race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”); American Convention on Human Rights art. 1, July 18, 1978, 1144 U.N.T.S. 123 (prohibiting discrimination based on “race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Apr. 11, 1950, C.E.T.S. 005 available at http://conventions.coe.int/Treaty/en/Treaties/Htm/005.htm (prohibiting discrimination on “any ground, such as race, sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”); see also Cairo Declaration on Human Rights in Islam art. 1(a), Aug. 5, 1990, O.I.C. Res. No. 49/19-P (1990) available at http://www.religlaw.org/interdocs/docs/cairohrislam1990.htm (stating that “[a]ll men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, or other considerations”).

\textsuperscript{119} International Convention on the Elimination of All Forms of Racial Discrimination G.A. Res. 2106 (XX) (entered into force Jan. 4, 1969), ratified by the United States (entered into force Nov. 20, 1994); Declaration on the Elimination of All Forms of Intolerance
specifically mentioned, discrimination based on race, color, national or social origin is explicitly prohibited.120 Such discrimination often overlaps or is conflated with discrimination against immigrants.121 In addition, much of the general treaty language prohibits discrimination on undefined "other" grounds as well.122 Despite this comprehensive ban on discrimination based on individual characteristics, differential treatment of citizens and noncitizens has largely been accepted without examination based on an expansive view of sovereignty.123 However, the equally expansive prohibition on discrimination that is recognized in international law—a prohibition that continues to expand to include new categories—offers the potential to challenge this additional form of discrimination based on citizenship.124 At a minimum, the global commitment to equal treatment requires closer, and ongoing, scrutiny of the distinctions that are made between citizens and noncitizens.

While still far from displacing the dominance of sovereignty, the principles of self-determination, freedom of movement and nondiscrimination have started to constrain unfettered notions of sovereignty as a matter of international human rights law. This evolved understanding of sovereignty

---

120 See supra notes 114-17 (providing exemplar treaty language prohibiting discrimination based on race, color, national or social origin).

121 The Committee on the Elimination of Racial Discrimination, the treaty body charged with monitoring compliance with the Convention on the Elimination of All Forms of Racial Discrimination, has recognized this connection. In 2004, the Committee adopted General Recommendation 30, Discrimination against Non–citizens. Gen. Rec. 30, Discrimination Against Non–Citizens, CERD/C/64/Misc. 11/rev.3 (Comm. on the Elimination of Racial Discrimination Mar. 12, 2004), available at http://www.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc. Although the General Recommendation acknowledges that the Convention "provides for the possibility of differentiating between citizens and non–citizens," it calls on States to avoid using that provision to undermine the general prohibition on discrimination. Id. at ¶ 1–2.

122 See supra notes 116–22 and accompanying text (prohibitions of discrimination on "other status" or "other social condition").


124 See Johnson, supra note 10, at 215–21 (discussing the racism apparent in current U.S. immigration law and policy).
and its relationship to human rights could—and should—inform the domestic view of immigration law in the United States, particularly because of the important role of sovereignty in shaping that law and the domestic history of expanding rights protection in other areas. However, this more nuanced understanding of sovereignty has largely been absent from policy debates and legal reform efforts in the United States. While few policymakers advocate completely closed borders or a complete absence of rights for immigrants or noncitizens, the dominant view expressed has focused on increased restrictions on immigration. There are strong, but infrequently articulated, arguments for moving in the opposite direction of current U.S. policy—away from increasing closure of the borders and towards open borders—all of which are compatible with a more balanced recognition of both sovereignty and rights.

B. Opening the Borders in U.S. Immigration Law

It is not inevitable, and surely not desirable, that U.S. immigration law and policy continue to reflect the sweeping view of sovereignty postulated over a century ago without consideration of the benefits and opportunities offered by increased rights protection and more open borders. As an initial matter, there is the very practical argument that the policies of “closure” have fundamentally failed to address the primary concerns that justify them, and in fact, the likelihood that such policies have been counterproductive. In fact, more open borders may offer the potential for both short-term and long-term national security, economic and cultural benefits domestically and globally. Moreover, and perhaps more importantly, the emphasis on closed borders is inconsistent with many U.S. national and cultural values that embrace individual and group rights, including the rights to self-determination, free movement and nondiscrimination.


126 The sense that current policies have failed to address policy goals spans the political spectrum. Compare, e.g., Massey, supra note 70, at 1, with Rob Sobhani, United? States, Our Immigration Problem, National Review Online (July 9, 2002), http://www.nationalreview.com/comment/comment-sobhani070902.asp. See also Robert Pear, Many Employers See Flaws as Immigration Bill Evolves, N.Y. TIMES, May 27, 2007, at 123 (quoting Mr. E. John Krumholtz, director of federal affairs at Microsoft, on the proposed immigration reform bill, “[t]he deal is worse than the status quo, and the status quo is a disaster”).

127 Many of these values are reflected in the U.S. Bill of Rights and civil rights legislation. U.S. Const. amend. XIV (rights to life, liberty, due process and equal protection); U.S. Const. amend. XIII (abolishing slavery); 42 U.S.C. § 1983 (2000) (creating a cause of action for “deprivation of any rights, privileges, or immunities secured by the Constitution”). They are also reflected in the U.S. ratification of the ICCPR. See supra note 91. See also Johnson,
Given the long historical development and many complexities of U.S. immigration law, it is difficult to envision what a shift towards open borders would look like in detail. At the outermost end of the spectrum, we could imagine a national border comparable to the internal U.S. state borders, devoid of any controls or limits on entry and exit. Such a policy could eliminate any numerical caps, restrictive categories, or grounds for exclusion. It could dismantle the large and complex administrative and legislative regime set up to deal with both immigration benefits and enforcement. However, the policy would not have to go so far, and arguably, such an extreme shift would simply risk repeating the policy imbalance in the opposite direction and ignore valid concerns that support some restrictions or limitations. Is it possible, then, to advance individual

---

128 Kleven suggests "substantial, though not unrestricted, freedom of movement in both the emigration and immigration contexts, subject however to a balancing process that would also give substantial weight to the interests of others affected thereby and of society as a whole[,]" would satisfy liberal ideals. Kleven, supra note 81, at 83. See also Pécoud & Guchteneire, supra note 10, at 1.

129 In proposing recognition of a right to free movement as early as 1971, Nett identified the United States as a model of an "open system of world migration:" Do we have any knowledge of how an open system of world migration might work? We have limited cases. One might think of free movement of people within the British system. A clearer example, however, is within the United States of America, where people have, and have had, the right of free movement since slavery was abolished more than a century ago. Here we have a fair-sized experiment to see how free movement operates in one instance. It works surprisingly well on one subcontinent anyway. When there is a drought in one region, as in the dust-bowl days of the 1930s, people move to another region, and opportunities are somewhat equalized. When clumsy state officials or demagogues disrupt a school system, teachers move to another state. This has a corrective effect on state policies or, if it does not, enriches the states which have better policies or more to offer. Imagine what it would be like if everybody were kept within the boundaries of his own state, and you have a fair picture of most of the rest of the world today!

Nett, supra note 2, at 219–20. Other models include some of the regional approaches to free migration. See Pécoud & Guchteneire, supra note 10, at 20–22 (describing the European Union and other regional examples).

130 See supra notes 43–59 and accompanying text (describing existing limitations).

131 A freer system of migration would not eliminate, of course, the responsibility of migrants to obey local laws; rather, as Nett argues, it would make it easier for them to do so. Nett, supra note 2, at 220. For an argument in support of retaining some border controls in the European Union context, see J.P.H. Donner, Abolition of Border Controls, in FREE MOVEMENT OF PERSONS IN EUROPE 5, 6–8 (Henry G. Schermers et al., eds. 1993).

132 The risks would be particularly high if the U.S. undertook such measures unilaterally without considering the impact on neighboring countries and regional impact. See, e.g., Nett,
rights and still account for concerns about national security and economic and cultural impact?

Perhaps a better and more easily conceivable model is that provided by the European Union. Although there are many aspects of the European Union system that are unique and may only be appropriate to that system, it offers a tantalizing example in several respects. First, individuals living within the system are considered citizens of both their own nation-states and of the European Union. This model presents a new and more open conception of citizenship, a dual citizenship, including both a national citizenship and a regional or supranational citizenship. Broader citizenship would extend the relationship beyond individual and nation to encompass other nations and their citizens as well. Second, an important feature of the European Union system is the freedom of movement permitted within that system. In fact, that freedom of movement—to work, to live, to travel—is characterized as an essential aspect of the system. Although there are

supra note 2, at 221–23 (noting potential problems of “brain-drain,” short-term instability, and concerns about national security, employment and cultural compatibility).

The European Union began with six Member States in 1950, with the creation of the European Coal and Steel Community. Rogers & Scannell, supra note 123, at 3–10 (describing the four founding Treaties of the European Union and the subsequent amending treaties). The European Union has since expanded to 25 Member States. Id. at 3. It has its own decision–making institutions and law, including human rights law, but also works in the broader framework of regional human rights law. Id. at 10–17 (describing the main institutions of the European Union), 35–44 (describing relationship between EU law and the European Convention on Human Rights).

Article 17 of the European Community Treaty provides, “Citizenship of the Union is hereby established. Every person holding the nationality of a member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.” EC Treaty, supra note 123, art 17(1) (noting potential problems of “brain-drain,” short-term instability, and concerns about national security, employment and cultural compatibility).

The uniqueness and potential enormity of these provisions—based on the creation of the novel concept of citizenship of a supranational body—should be acknowledged."


Article 18 of the European Community Treaty sets forth this central right, “[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.” EC Treaty, supra note 123, art. 18(1).

Rogers & Scannell, supra note 123, at 77–78 (describing the gradual extension of free movement rights within the EU and suggesting that “any EU citizen should have the right to move and reside in the territory of another Member State simply by virtue of being a Union citizen”). The European Court of Justice has used principles of human rights to infer a right of residence even when not directly conferred by the EC Treaty and secondary legislation. See Case C-60/00, Carpenter v. Sec’y of State for the Home Dep’t, 2002 E.C.R. I-6279,
requirements and some limitations attached to the free movement, it is fundamentally conceived as a freedom to move across borders. Finally, the laws regarding movement and migration in the particular nation-states of the European Union and within the European Union system exist also within the framework of supranational human rights law, particularly the regional European human rights system. The human rights law of the European Union and of the European Convention on Human Rights provide context for the development of migration in the region. Thus, the European Union system reflects a model of migration and borders that balances national sovereignty with individual rights protection within a framework of regional, if not global, cooperation.

Short of adopting such a regional model, however, or taking steps in the progression to that end, at a minimum, the shift to open borders should include a reexamination of the basic aspects of U.S. immigration law and policy in light of the countervailing rights at stake. Using individual self-determination, freedom of movement and non-discrimination as guiding principles, an open borders approach would mean raising, eliminating or adjusting the numerical caps to more accurately reflect demand; it would also suggest eliminating the specific immigrant categories or adding an unrestricted category of open immigration. It would require a reversal of the trend towards adding and expanding the grounds of exclusion and removal. Finally, it would mean rationalizing the process by shifting the presumptions away from exclusion and towards inclusion, as well as shifting resources away from enforcement efforts and towards the provision of immigration services.

Such a shift in perspective, in this case on who may enter the country, is not completely unprecedented in U.S. immigration law; it occurred in the

138 EC Treaty, supra note 123, art. 18(1); ROGERS & SCANNELL, supra note 123, at 77–78 (discussing scope of the freedom of movement).


140 Id.


142 See supra notes 64–77 and accompanying text (describing existing caps and categories and problems of limitations and backlogs).

143 See supra notes 47–59 and accompanying text (describing grounds for exclusion and removal). By far, the most expansive and frequently used category is the crime-related grounds, particularly the subsection permitting removal based on conviction for an “aggravated felony.” DOUGHERTY ET AL, supra note 55, at 5 (stating that 43 percent of removals in 2005 were based on crime-related grounds); see also 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (a non-citizen “convicted of an aggravated felony at any time after admission is deportable”).
The early days of the nation, at common law, an individual could not renounce his or her citizenship without the consent of the sovereign. The powers both to bestow and to release from citizenship were considered sovereign powers. However, in the later 1800s, the United States began entering into reciprocal treaties with other countries, recognizing an individual right to renounce citizenship upon naturalization in a foreign country. Denationalization—the deprivation of nationality by unilateral fiat of the state—has been increasingly disfavored in both international and domestic law. For the most part, the law now requires the consent of the individual, rather than the sovereign, to relinquish citizenship.

The reasons to consider such a shift are evident. As a practical matter, the limitations on immigration and efforts at enforcement discussed above have failed to resolve the primary concerns that motivated them.

---

144 See Shanks v. Dupont, 28 U.S. 242, 246 (1830) (“The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens”); see also Brownlie, supra note 18, at 385–424.

145 Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 604–05 (1889) (listing a range of “sovereign” powers, including the power to “admit subjects of other nations to citizenship”); Shanks, 28 U.S. at 246 (stating the general rule that a person cannot renounce citizenship without the consent of the government); see also Brownlie, supra note 18, at 385–424.


147 See supra notes 107–13 and accompanying text; see, e.g., Afroyim v. Rusk, 387 U.S. 253, 262 (1967) (acknowledging constitutional right to remain a citizen unless one voluntarily relinquishes); see also Universal Declaration, supra note 83, art. 15.

148 Naturalized U.S. citizens are treated differently in this respect than U.S.-born citizens. Both are subject to expatriation, which is typically the voluntary relinquishment of citizenship. INA, 8 U.S.C. § 1481(a) (2007) (focusing on voluntary actions of citizens by birth or naturalization). However, only naturalized citizens are subject to denaturalization. Id. § 1451 (stating various bases for revoking naturalization).

149 Even with more expansive ways to assume citizenship, there would likely still be a process to pursue and perhaps even certain criteria to satisfy. However, the presumption of availability would shift, and it would be more broadly available for those who choose it. Despite the current political climate, recent polls suggest that most Americans favor immigration reforms that would allow a path to citizenship for immigrants, even those who are in the country without authorization. See The New York Times–CBS News Poll, Question 17, March 7–11, 2007, at 14, available at http://graphics.nytimes.com/packages/pdf/national/20070313_pollresults.pdf; Gallup Poll, Immigration at 1–2, 2007, available at http://www.galluppoll.com/content/default.aspx?ci=1660.

150 See Johnson, supra note 10, at 245–52 (discussing the problems of enforcement that
BORDER POLICY AND HUMAN RIGHTS

Over the past decade, and particularly since September 11, 2001, the immigration laws have become more and more strict, the bureaucracy has been dramatically expanded and additional resources have been devoted to enforcement. However, the public perception, and likely the reality, is that the “problem” of immigration—particularly unauthorized immigration—has only increased. In fact, it appears that the policies of closure may have been counter-productive in several respects. Those who enter the U.S. without authorization are more likely to stay in the U.S. to avoid the risks of subsequent border crossings. The less the laws reflect a fair balance of policy, the more likely they are to encourage disrespect for the law. Perhaps most troubling, excessive enforcement efforts divert resources to marginal problems that could be used more efficiently for problems of serious concern, such as economic development and prevention of terrorism.

In addition, more open borders offer the potential for both short-term and long-term benefits to the United States and on a larger global scale. A policy that is geared solely towards closure misses the opportunities offered by immigration. Undoubtedly the U.S. benefits from immigrant

have arisen); Juss, supra note 19, at 309-11 (discussing practical difficulties in restricting migration); Pécoud & Guchteneire, supra note 10, at 4-5 (noting the consensus among experts that “tougher measures of migration control do not reach their proclaimed goal”).

See supra note 57 (noting that the proposed budget for Customs and Border Protection for FY 2007 is approximately $8 billion and addressing the expanding numbers of personnel and scope of enforcement actions). See generally 2005 Yearbook of Immigration Statistics, supra note 44.

Although most Americans favor providing a path to citizenship for immigrants, concerns about the rates of unauthorized immigration remain high. See The New York Times–CBS News Poll, supra note 149, at 14, Questions 16-17; see also Gallup Poll, supra note 149.

See Pécoud & Guchteneire, supra note 10, at 13-14.

See, e.g., Juss, supra note 19, at 31-12 (describing the counter-intuitive effect of “get tough’ asylum policies” in Europe that ended up increasing “irregular migration”... ‘in defiance of national laws or regulations’).

See Transactional Records Access Clearinghouse (TRAC), Immigration Enforcement: the Rhetoric, the Reality, available at http://trac.syr.edu/immigration/reports/178/ (last visited Oct. 13, 2007) (TRAC report based on analysis of records from the Immigration Courts and the Justice Department finds that only a “tiny fraction” of all Department of Homeland Security actions regarding immigration involve terrorism despite claims that this issue is a high priority mission of the DHS; instead, the overwhelming majority of actions involve immigration charges, primarily violations based on entering the U.S. without inspection); see also Johnson, supra note 10, at 260-62 (discussing the opportunities to focus on issues such as national security in an open border regime); Nett, supra note 2, at 225 (discussing “social waste” caused by diverting excessive resources to border control); Michael J. Trebilcock, The Law and Economics of Immigration Policy, 5 Am. L. & Econ. Rev. 271, 276-84 (2003) (discussing economic benefits of immigration).

Those benefits may be both tangible and intangible. Nett, supra note 2, at 225 (noting advantages such as “remov[ing] the unrealistic ideas that people have about others,” ameliorating some of the negative effects of nationalism, eliminating the “social waste” that derives from “situational inopportunity” and from excessive costs of enforcing borders).
labor—both skilled and unskilled. An open border will promote more efficient allocation and use of labor and other economic resources, not just domestically, but also regionally and perhaps globally. In addition to economic benefits, there are also cultural benefits to diversity, increased family unification, and the respect for individual rights reflected in an open immigration policy. Finally, and importantly, the emphasis on closed borders is inconsistent with many U.S. national and cultural values, including nondiscrimination, diversity, tolerance, individuality, self-determination, freedom of movement and association, and other rights protection.

CONCLUSION

A call to consider “open borders” may seem utopian or even naive at this stage of U.S. immigration policy development and in the context of the current political climate. At the end of my immigration course, I repeat the survey of where students place themselves on the policy spectrum, and often those who voted initially for open borders have moved themselves away from that position to another spot on the continuum. Interestingly, while we have typically lost the advocates for open borders, there has not yet been an increase in advocates for closed borders. Perhaps as their understanding of the complexities of the system and the competing policy goals increases, students are reluctant to stake out an inflexible position at one end of the spectrum. However, U.S. immigration policy is currently doing just that—staking out an inflexible position at the “closed borders” end of the spectrum.

It is time to consider seriously the thoughtful and persuasive arguments that support rebalancing U.S. immigration policy by moving in the opposite direction, towards open borders. Many of these arguments are grounded in the same principles of international law that originally supported an absolute power to exclude inherent in a national sovereign and that have


158 See Juss, supra note 10, at 315–16 (discussing the “positive long-term effects of freer migration”); Péoud & Guchteneire, supra note 10, at 9–13 (summarizing the positive economic aspects of freer migration); Trebilcock, supra note 155, at 275–96 (discussing economic impact and perspectives on immigration).

159 These values are identified as policy goals in existing immigration policy. See supra note 45 and accompanying text (discussing family-sponsored, employment-based and diversity immigration).

160 See supra note 127 and accompanying text.
now evolved to recognize the importance of individual human rights. The policies of "closure" have failed, and an unthinking adherence to them, or expansion of them, will only offer more of the same. An overemphasis on closure and enforcement ignores the potential opportunities and benefits of open immigration, in both the short-term and long-term and both domestically and globally. Ultimately, such policies disregard and even undermine core U.S. national and cultural values.

As Congress considers, once again, legislation to reform U.S. immigration law, it is time to move beyond the unbalanced focus on limited guest worker programs and increased border enforcement. A new immigration policy should be grounded in principles of international law that balance respect for sovereignty with recognition of individual human rights; a more imaginative and effective immigration policy must reflect meaningful consideration of the merits of open borders.